87-1110

No. - .

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MARSHALL YOUNG, ADMINISTRATOR OF THE ESTATE OF LLOYD YOUNG AND CAROLE YOUNG,
Petitioners,

v.

ATLANTIC RICHFIELD COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

PETITION FOR WRIT OF CERTIORARI

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December 30, 1987

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Whether the highest appellate court of a state deprives an appellant of the due process guarantee of the Fourteenth Amendment by arbitrarily disregarding its own "rational view of the evidence" standard of appellate review and intruding upon, and usurping, the right to trial by jury guaranteed in a civil case by that state's constitution, by ignoring the evidence before the jury and substituting extrajudicial views of the evidence of the case, effectively branding all contrary views (including those of one of its own Associate Justices) as irrational.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

This petition seeks review of a majority decision of the Supreme Judicial Court for the Commonwealth of Massachusetts (Abrams, J., dissenting), which is reported as *Young* v. *Atlantic Richfield Co.*, 400 Mass. 837, 512 N.E.2d 272 (1987) and reprinted as Appendix A.[1] The final judgment of that

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[1] References to the appendices will be styled as follows: (A.) to particular pages in the appendices; and (R.) to portions of the trial court record.

court is reprinted as Appendix B. The Petitioners' petition for hearing by the Supreme Judicial Court is reprinted as Appendix C. The order of the Supreme Judicial Court denying rehearing is reprinted as Appendix D.

JURISDICTION

The decision and judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts were rendered and entered on September 2, 1987. A timely petition for rehearing was denied on October 1, 1987. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. Constitutional Provisions

The Fourteenth Amendment, Section 1:

> No state shall . . . deprive any person of life, liberty or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.[2]

B. Other

Constitution of Massachusetts, Declaration of Rights, Article XV:

> In all controversies concerning property, and in all suits between two or more persons, . . . the parties

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[2] The constitutional issues involved in this Petition for Certiorari were raised in the Petitioners' petition for rehearing by the Supreme Judicial Court for the Commonwealth of Massachusetts.

have a right to a trial by jury; and this method of procedure shall be held sacred . . ..

STATEMENT OF THE CASE

A. Procedural History

Plaintiff (Petitioner), Marshall Young, Administrator of the Estate of Lloyd Young, brought this action for wrongful death of his son, Lloyd Young, against various defendants including the Atlantic Richfield Co. ("Arco" — the only petitioner pertinent to this petition) (R. 21-23). The Plaintiff (also Petitioner), Carole Young, the decedent, Lloyd Young's mother, added a separate count for emotional distress (R. 29-31).

On February 5, 1985, a jury of the Norfolk County Superior Court of the Commonwealth of Massachusetts returned a special verdict in favor of both plaintiffs (petitioners) on the negligence counts (R. 41-44). The trial court, Meyer, J., denied Arco's Motion for Judgment Notwithstanding the Verdict and for a New Trial (R. 11), and entered judgment on the verdicts. Arco appealed the judgments against it to the Appeals Court of Massachusetts in a timely fashion.

On June 12, 1986, the Supreme Judicial Court for the Commonwealth of Massachusettts ordered the appeal transferred from the Appeals Court to the Supreme Judicial Court on its own motion (A. 2a). On September 2, 1987 (with Justice Abrams dissenting) the Supreme Judicial Court reversed the judgments of the trial court and entered judgment for Arco. On

September 16, 1987, the plaintiffs (petitioners) filed a timely petition for rehearing with the Supreme Judicial Court, raising for the first time the constitutional issues involved in this petition (since such issues first arose in, and by virtue of, the opinion and decision of the Supreme Judicial Court[3]) (App. 20a). On October 1, 1987, the Supreme Judicial Court denied the petition for rehearing (App. D).

B. Statement of Facts

This petition arises out of a case involving an automobile accident on June 22, 1977, in which Lloyd Young, a fifteen-year-old boy, was killed while dispensing gasoline at a service station owned and built by the Atlantic Richfield Company (Arco), and leased to John Santilli, the station's operator at the time of the accident (A. 2a).

Mini Serve Program

On June 22, 1977, the station contained a building and two service islands, each island containing gasoline pumps and an air register (air pump) (A. 2a). One gasoline pump on one of the islands had a sign on its top reading "mini-serve" (A. 2a). Mini-serve was a program developed by Arco in the early 1970's as an incentive to lessee-dealers to increase gasoline sales (A. 3a). The dealer was required to dispense gasoline, but would provide no additional services; in return for such limited services, the dealer would charge 2 to 3 cents less per gallon for gasoline sold at the mini-serve pump (A. 3a).

Foreseeability of Injury to Persons Pumping Gas While Distracted Due to Unfamiliarity

According to the testimony of Arco's Stanworth, the person who came up with the idea for the mini-serve program (R. 654), and the person who created the "mini-serve" name (R. 654), the term "mini-serve" by itself did not tell customers anything about who was to dispense gasoline (R. 718). Instead, the mini-serve sign was intended only to identify the mini-serve pump and would have meaning only after customers were already familiar with the program. Such familiarity was to come by word-of-mouth — from Arco's sales representatives to the dealers they served, then to the dealers' customers, and finally from customer to customer (A. 4a).

By way of contrast, at the same time, Arco had a policy of equipping all of its self-service stations (which were different from mini-serve), with so-called pump precautions signs (A. 4a) which contained, as one of such precautions, Arco's recommendation for the safe dispensing of gasoline that the person "be aware of other vehicles in the area" (A. 4a), and this "was something Arco 'recommend[ed] to *people who were unfamiliar with the proper procedure* for dispensing gasoline' " (App. C-17a n.3) (emphasis in original). In addition to the evidence concerning Arco's pump precautions signs at self-service stations, evidence was admitted at trial showing that Arco felt such a warning to be necessary and that the risk of a person being injured (by being struck by another vehicle while distracted when preoccupied with the dispensing of gasoline) was foreseeable *prior to the accident*.

Arco was advised by its sales representatives in the field, seventeen months prior to the accident, that there was a need for an *instructional* sign for the mini-serve program (R. 1502). Scott Stanworth admitted that fifteen months before the accident "someone at [Arco] felt it was appropriate to prepare a sign

that gave the customer more specific information . . . to make it clearer . . . [as to] who pumped the gas" (R. 752-753) and to provide further information as to the meaning of mini-serve (R. 755); "customers did not understand what mini-serve meant because [both mini-serve and self-serve] stations were extremely uncommon at the time of this accident" (A. 10a) (in fact, Scott Stanworth admitted that, at the time of the accident, both mini- and self-serve were new concepts and marketing devices (R. 687)).

Risk Not Obvious While Distracted

The risk of being struck by another vehicle while a person was distracted when dispensing gasoline was "one of the risks of pumping gas" (R. 219), a risk which Santilli testified "wasn't a risk that was obvious" (R. 219), and one which he himself "did not appreciate . . . prior to entering the gas station business" (A. 11a); and Arco, "in training [its own] employees in the safe dispensing of gas [and in asking its dealers to instruct their own people (App. C-18a n.4)] . . . instructed them to be alert for vehicles in the area" (A. 11a).

Confusion as to Meaning of Mini-Serve

As a result of the unexplained meaning of the mini-serve sign at Santilli's station at the time of the accident (the sign read merely "mini-serve" and no more), customers were confused. "Santilli testified that his customers were confused by the mini-serve sign" (A. 4a) and "that many customers pumped their own gas at the mini-serve pump because they thought mini-serve meant self-serve" (A. 10a). Carole Young, the mother of the decedent, Lloyd Young, testified that she

"thought 'mini-serve' meant 'self-service' [so that] [s]he drove into the station on the day of the accident and saw two cars at one of the islands . . . [and] said, 'These pumps are busy, but the other side is self-service.' She also testified that her son Lloyd responded: 'Well, go to the self-service one. I'll pump the gas.'" (A. 2a.)

"Carole Young drove her car to the pump with the mini-serve sign, and Lloyd got out to pump the gasoline . . . Lloyd pumped $5.00 worth of gasoline, and then returned to the rear of the car to replace the cap on the gasoline tank [A. 2a-3a] . . . [with] which he was having difficulty" (A. 12a). "He had never pumped gas before. He was not old enough to drive" (A. 12a).

While Lloyd Young was struggling to replace the gasoline cap, a car behind him backed up to reach an air pump located in the middle of the island. The car failed to stop and crushed the boy to death.

At the time of the accident, Arco had already developed a more informative mini-serve sign (R. 839, 1497-1498) which stated that the attendant will pump gas (A. 4a). These signs were available at Arco's distribution terminal only a few miles away almost a year earlier — on August 12, 1976 (R. 852-854, 1530), although Santilli was never made aware of them (A. 4a).

After setting forth the Massachusetts standard of review, the Supreme Judicial Court disregarded that standard and reversed, finding that there is "no rational view of the evidence . . . which would support the verdicts" (A. 5a).

REASONS FOR GRANTING THE WRIT

Although the Fourteenth Amendment does not mandate that a litigant in a civil case receive a trial by jury, due process does

require where state law grants a civil litigant such a right, that it not be arbitrarily or capriciously deprived.[3]

In Massachusetts, the state constitution does grant civil litigants this right. The Constitution of Massachusetts, in Article XV, Part I, of its Declaration of Rights, states that: "In all controversies concerning property, and in all suits between two or more persons, . . . the parties have a right to a trial by jury; and this method of procedure shall be held sacred . . . ."

The Supreme Judicial Court for the Commonwealth of Massachusetts has stated, "[t]he right to trial by jury as set forth in the Constitution [of Massachusetts] must be and has been strictly preserved." *Comm'r of Banks* v. *Harrigan*, 291 Mass. 353, 356, 197 N.E. 92, 94 (1935). "It is familiar law that the right of trial by jury secured by art. 15 of the Declaration of Rights is sacred and must be sedulously guarded against every encroachment . . . ." *H.K. Webster Co.* v. *Mann*, 269 Mass. 381, 385, 169 N.E. 151, 153 (1929).

Because in Massachusetts, the right to a trial by jury is deemed sacred under the state's constitution, the Supreme Judicial Court has established a fundamental, long-standing standard of appellate review.[4] "[T]he test is whether 'anywhere

[3]The Fourteenth Amendment requires that "[n]o State shall . . . deprive any person of life, liberty or property without due process of law." It has long been clear that the rights sought to be enforced via civil litigation are within the scope of those property interests the Fourteenth Amendment was intended to protect: "the Court [has] held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). As noted by the Court in *Logan*, "[t]he Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Id.* at 429.

[4]See *Hewitt* v. *Helms*, 459 U.S. 460, 472 (1983) (state laws that explicitly and repeatedly require specific substantive predicates client rights cognizable under the due process clause of the Fourteenth Amendment).

in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff.'" *Raunela* v. *Hertz Corp.*, 361 Mass. 341, 343, 280 N.E.2d 179, 181 (1972), quoting *Kelly* v. *Railway Exp. Agency, Inc.*, 315 Mass. 301, 302, 52 N.E.2d 411 (1943). *Poirier* v. *Plymouth*, 374 Mass. 206, 212, 372 N.E.2d 212, 219 (1978). Only when no rational view of the evidence warrants a finding that the defendant was negligent may the issue be taken from the jury. *Zezuski* v. *Jenny Mfg. Co.*, 363 Mass. 324, 327, 293 N.E.2d 875 (1973). Accord *Irwin* v. *Ware*, 392 Mass. 745, 764, 467 N.E.2d 1292 (1984); *Mullins* v. *Pine Manor College*, 389 Mass. 47, 56, 449 N.E.2d 331, 338 (1983).

In the present case, the Supreme Judicial Court acknowledged that the aforesaid standard of review was still the law of Massachusetts (A. 5a), yet disregarded it in a wholly arbitrary fashion. Justice Abrams agreed with the court's statements of its standard of review, but pointed out that "[i]t does not appear, however, that the court applied these principles"[5] (A. 8a n.1, Abrams. J., dissenting).

That the Supreme Judicial Court did not follow its own constitutionally based standard of review is particularly evident in this action where the petitioner sued the respondent principally for its negligent failure to provide an adequate warning. As Justice Abrams remarked in this regard:

> [W]hether a particular warning, or whether the omission of a particular warning, satisfies the duty to convey the nature and extent of the danger "is almost

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[5] The opinion by Justice Nolan confirms that this is a case of judicial intrusion: "Although we have said that judicial intrusion into jury decision-making in negligence cases is exceedingly rare, *MacDonald* v. *Ortho Pharmaceutical Corp.*, 394 Mass. 131, 140, cert. denied, 106 S.Ct. 250 (1985), these verdicts cannot stand." (A. 5a.)

> always an issue to be resolved by a jury; few questions are 'more appropriately left to a common sense lay judgment than that of whether a written warning gets its message across to an average person.' . . ."

(A. 8a n.1), quoting *MacDonald* v. *Ortho Pharmaceutical Corp.*, 394 Mass. 131, 140, 475 N.E.2d 65, 71, *cert. denied*, 474 U.S. 920, 106 S.Ct. 250 (1985).

In *MacDonald* v. *Ortho Pharmaceutical Corp.*, *supra*, the plaintiff pursued a claim in the trial court alleging the defendant's negligent failure to provide an adequate warning. However, in that case, the trial court granted a motion for judgment notwithstanding the verdict thus taking the matter away from the jury's consideration. The Supreme Judicial Court in that case drew upon the considerable Massachusetts precedent and applied the "rational view" test, concluding that the trial court's actions amounted to an intrusion into the jury function, and restored the jury verdict. Whereas, the Supreme Judicial Court in this case (where the trial judge concluded that the evidence supported the jury's finding of negligence and denied Arco's motion for judgment notwithstanding the verdict) judicially ignored the actual case that was before the jury and considered matters beyond the evidence (not appropriate for judicial notice) and inexplicably took the case away from the jury.

The majority's citation of *MacDonald* to support its intrusion upon the jury finding is erroneous (A. 5a); that decision actually restored the jury verdict. This Court, as the ultimate guarantor of due process, must review the wholly arbitrary action of the state's highest appellate court in going beyond the constraints imposed on the court system.

This case presents a substantial federal question involving the contours of the Fourteenth Amendment "in protecting the

individual citizen from state action that is wholly arbitrary or irrational." *Martinez* v. *California*, 444 U.S. 277, 282 (1980). Due process of law, in its most fundamental sense, is concerned with the manner in which the rule of law is applied. Here, the petitioner does not quarrel with the substantive rule of tort law that the Supreme Judicial Court enunciates in its opinion below. *Engle* v. *Isaac*, 456 U.S. 107, 121 and n.21 (1982). However, the petitioner challenges that the Supreme Judicial Court cannot take away the jury finding on the evidentiary record that was created below in this case. To reach its conclusions that the respondent is not liable to the petitioner as a matter of law, the court ignores the substantial evidence in the record that supports the jury's verdict, thus blatantly violating its own standard of appellate review. Moreover, the court attempts to support its bald conclusions with facts that are not a part of the record nor fit to be judicially noticed.

The court reached conclusions about obviousness as a matter of law flying in the face of evidence from Santilli, the (gas) service station operator,

> that another vehicle not in your control could bump into you . . . that's one of the risks of pumping gas, . . . a risk that wasn't obvious to [Santilli] before [he] learned . . . the gas station business."

(R. 217-219.)

As Justice Abrams noted in her dissent (A. 11a-12a)

> . . . Santilli stated that, prior to entering the gas station business, he did not appreciate the dangers

> posed by other vehicles at the gas station. Moreover, in training employees in the safe dispensing of gas, Arco instructed them to be alert for vehicles in the area. Finally, a warning of this sort was included on the self-service pumps. Arco did not consider the danger presented by other vehicles to be so obvious that it was unnecessary to warn both employees and the public. Cf. *Kalivas* v. *A.J. Felz Co.*, 15 Mass. App. Ct. 482, 487 (1983) (jury could find that a warning given to the public which was not as extensive as that given to salesmen rendered product defective). Given that Arco itself realized that individuals dispensing gas may not appreciate the dangers posed by other automobiles, it is also error for the *court to take this issue from the jury* and decide, as a matter of law, that the dangers associated with other automobiles in the gas station are obvious . . . . Whether the victim could appreciate the dangers creates an issue for the jury, not the court. [Emphasis added].

One is hard pressed to see how any view of the evidence could lead to any inference *other* than that, from Arco's pre-accident perspective, the accident was foreseeable and the risk was not obvious to people not familiar with the mechanics of dispensing gas and who would be distracted while doing unless provided with appropriate warnings or instructions.

The conclusion that there is "no rational view of the evidence . . . which would support the verdicts" (A. 5a) is nothing less than a determination that the views of other judges (including one of the justices of this Court) who have reviewed the evidence in this case based their conclusions upon irrational views of the evidence. In this regard, *it is important to note that Justice Abrams' dissent* was found essentially upon a "view"

and analysis of the *evidence*. The mere existence of a dissenting view by one justice based upon such justice's view of the evidence is a *per se* manifestation that the majority's conclusion that "no rational view" would support the verdicts is incorrect; the dissent is irreconcilable with such a conclusion.

The net effect is that the Court substituted its own view of the evidence for that of the jury, but to do so, the Court effectively had to brand all contrary views, including those of one of its own Associate Justices, as irrational.

The majority decision seriously misapprehended the evidence before the jury. Rather than the dangers of moving vehicles in gas stations, it was the dangers of a customer being stuck by another vehicle while *distracted* and preoccuppied during the unfamiliar process of dispensing gas, and that while so distracted a person would be placed in a vulnerable position so that he would become unaware of what otherwise might have been obvious, namely vehicles moving within the station, that was the gravamen of this case.

The concurring opinion (A. 8a) reveals that the evidence before the jury played no part in the conclusions of the court, which were actually based extra-judicial notions of inherent and obvious risks of injury. "A judge's private knowledge, or even knowledge by notoriety, to use Dean Wigmore's phrase, IX Evidence, § 2569 (Third ed. 1940), not presented as part of the prosecution's case capable of being met by a defendant, is not an adequate basis, *as a matter of due process*, to establish an essential element [of a case]. *Thompson* v. *City of Louisville*, 362 U.S. 199." *Garner* v. *Louisiana*, 368 U.S. 157, 175 (1961) (Frankfurter, J., concurring) (emphasis added).

Thus, this appeal challenging the wholly arbitrary manner in which the Supreme Judicial Court applied the standard of review raises a proper and substantial federal question; that is, whether the actions taken by the Supreme Judicial Court in reviewing this case on appeal violate the basic tenets of due process of law.

This case is like *Martinez* v. *California*, 444 U.S. 277, 282 (1980) (state's interests in fashioning its own rules of tort law is paramount to any discernable federal interest, except perhaps *an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational)* (emphasis added); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Lawrence* v. *State Tax Commission of Mississippi*, 286 U.S. 276, 282 (1931) (even though the claimed constitutional protection be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the State Court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not thus be avoided); and is unlike *Engle* v. *Isaac*, 456 U.S. 107, 121 and n.21 (1982) and *Gryger* v. *Burke*, 334 U.S. 428, 431 (1948). In *Garner* v. *Louisiana*, 368 U.S. 157, 163 (1961), notwithstanding the determination by the Louisiana Supreme Court that there was sufficient evidence to support the convictions, this Court reviewed the record and found the convictions "totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment."

Under the Constitution, ever since *Marbury* v. *Madison*, 1 Cranch. 137, 2 L.Ed. 60 (1803), it has been clear that the ultimate guarantor of constitutional rights, one of the most fundamental of which is the right to due process of law, is the judiciary. It is the judiciary which provides the final protection against arbitrary governmental action. And within the judiciary, it is the highest appellate courts which bear the greatest burden of such protection.

When it is the highest appellate court in a state which is the perpetrator of arbitrary governmental action, then there occurs the greatest betrayal of the constitutionally guaranteed right to due process of law. A denial of appellate due process is thus the ultimate and most serious denial of due process, and must therefore be the due process most zealously guarded by the Fourteenth Amendment.

In denying the plaintiffs (petitioners herein) their legitimate rights to a fair rather than arbitrary appellate review, the Supreme Judicial Court has denied them their due process rights guaranteed to them under the Fourteenth Amendment, and has thereby entitled them to invoke review by this Court:

> Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair and substantial basis.

Demorest v. *City Bank Co.*, 321 U.S. 36, 42 (1944), quoting *Broad River Power Co.* v. *South Carolina*, 281 U.S. 537, 540 (1930). It is an important principle of national interest and significance that appellate courts, even at the highest level within their states, be mindful that the due process interest in protecting the individual citizen from wholly arbitrary action is paramount and that such action is subject to review.

Conclusion.

For all of these reasons, a writ of certiorari should be granted now and this case should be set for argument.

Respectfully submitted,

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December 30, 1987

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MARSHALL YOUNG, administrator,[1] & another[2] *vs.* ATLANTIC RICHFIELD COMPANY.

Norfolk. May 7, 1987. — September 2, 1987.

Present: HENNESSEY, C.J., WILKINS, ABRAMS, NOLAN, & LYNCH, JJ.

Negligence, Mini-serve gasoline station, Standard of care, Duty to warn, Proximate cause. *Proximate Cause*.

At the trial of an action against the owner of a gasoline station arising out of the death of a fifteen-year-old boy who had been killed, while pumping gasoline into the fuel tank of an automobile parked by his mother at a "mini-serve" gasoline island containing several gasoline pumps and an air pump, when a second automobile whose driver sought to use the air pump backed into the boy, the evidence was insufficient to warrant a finding that the defendant was negligent in developing the "mini-service" program and in locating the air pump next to the gasoline pumps where, even assuming that the defendant's failure to post "an attendant will pump gas" sign was negligent, its negligence was not the proximate cause of the boy's death; where the owner had no duty to warn of the obvious danger of other automobiles near the service island; and where, although the air pump increased traffic at the service island, the increased possibility of injury which could result from increased traffic was a risk which was obvious and not unreasonable. [841-843] WILKINS, J., concurring; ABRAMS, J., dissenting.

There was no merit to the argument by the plaintiffs in a civil action that defense counsel's statement to the jury that the defendant would "stand by your verdict" amounted to a waiver of defendant's appellate rights. [843]

CIVIL ACTION commenced in the Superior Court on May 19, 1978.

The case was tried before *Andrew Gill Meyer*, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

[1] Of the estate of Lloyd Young.

[2] Carole Young.

Thomas D. Burns (*Christopher A. Duggan* with him) for the defendant.

Leonard Glazer (*David I. Levine & Frank E. Glazer* with him) for the plaintiffs.

NOLAN, J. This case arises out of an automobile accident, which occurred on June 22, 1977, at a gasoline service station owned by the Atlantic Richfield Company (Arco). Lloyd Young, a fifteen-year-old boy, was killed after pumping gasoline into the fuel tank of an automobile driven into the station by his mother, Carole Young. Lloyd Young's administrator brought a wrongful death action against Arco and its lessee, John Santilli, alleging, *inter alia*, that both parties were negligent. Carole Young, who was present at the time of the accident, also sought recovery for negligent infliction of emotional distress. The jury returned special verdicts in favor of the plaintiffs. Arco appealed and argues that the trial judge should have allowed its motion for directed verdicts, motion to dismiss or its motion for judgment notwithstanding the verdict.[3] We transferred the case on our own motion. We now reverse and order judgment to be entered for Arco.

1. *The accident.* Arco built and leased to Santilli an Arco service station containing a building and two service islands. Each island contained gasoline pumps and an air pump. One gasoline pump on one of the islands had a sign on its top which read "mini serve." Carole Young thought "mini serve" meant "self-service." She drove into the station on the day of the accident and saw two cars at one of the islands. She testified that she said, "These pumps are busy, but the other side is self-service." She also testified that her son Lloyd responded: "Well, go to the self-service one. I'll pump the gas." Carole Young drove her car to the pump with the mini-serve sign, and Lloyd got out to pump the gasoline. Santilli approached the boy and said, "I'll take care of it" or "I'll be with you in

[3] Santilli withdrew his appeal. Joseph Kovack, the driver of the car which collided with the Young vehicle, was a third-party defendant impleaded by Arco. Kovack settled the case brought by Lloyd Young's administrator, and did not appeal the judgment against him in the action brought by Carole Young.

a minute," and then returned to service the cars at the other island. Lloyd pumped $5.00 worth of gasoline, and then returned to the rear of the car to replace the cap on the gasoline tank.

Before the Youngs had entered the station, Joseph Kovack, a seventy-seven-year-old man, drove his car into the station and parked it next to the station building. He asked Santilli to check his tire for air and Santilli told him to pull over to the air pump at the island and he would be with him momentarily. Kovack backed up at a speed of between 12 and 15 miles per hour and crashed into Young's automobile, crushing Lloyd. Carole Young got out of her car and watched him die. As a result of this tragedy, Carole Young experienced "intrusive recollections and visualizations of her son's death" up until the time of trial, and an expert testified that this condition, post-traumatic stress syndrome, would likely continue for the rest of her life.[4]

2. *The plaintiffs' case.* On appeal, Arco argues that the evidence was insufficient to support the jury's verdict that it was negligent. The plaintiffs counter that Arco was negligent in developing the mini-service program, and in locating the air pump next to the gasoline pumps. This negligence, they claim, created an unsafe condition on the premises which caused the death of Lloyd Young and the subsequent injuries to Carole Young. We review the evidence in the light most favorable to the plaintiffs. *Poirier* v. *Plymouth*, 374 Mass. 206, 212 (1978).

Arco developed the mini-serve program in the early 1970's as an incentive to lessee-dealers to increase gasoline sales. Under the program, the dealer would pump gasoline but would provide no additional service, such as checking oil, checking air, or washing windshields. Gasoline at a mini-serve pump was typically 2 to 3 cents cheaper than at a full-service pump. Mini-serve was to be used only in areas where self-serve was illegal. An Arco representative admitted that, at the time of

[4] A videotape in support of this conclusion was admitted in evidence and shown to the jury. This tape was available on appeal, but, because of our result today, we do not reach the question of prejudicial emotionalism.

the accident, it was illegal for a gasoline station in Massachusetts to have both self-service and full-service islands. In 1977, self-service stations were permitted only where the entire station was used for self-service. Internal documents of Arco introduced in evidence indicated that Santilli's station was precisely the type of station at which Arco's mini-serve program was aimed.

Santilli testified that his customers were confused by the mini-serve sign. Arco representatives testified that they had no formal way of communicating the meaning of the mini-serve program to customers. Arco relied on sales representatives to explain the program to the dealers, who in turn were to explain it to the customers. According to testimony of an Arco representative, the mini-serve sign was only intended to identify the mini-serve pump once customers were familiar with the program. Nevertheless, Arco eventually developed a new sign which read "Mini Serve Island—attendant will pump gas—Use Full Serve Island for complete service." The new signs were available to dealers for $28.00 by 1976, but Santilli testified that he never saw one. Arco provided Santilli with a roof sign which said "Mini serve—check our gas prices," an entrance sign which said, "Low Gas Price," and a mini-serve pump sticker which said, "Look Low Price."

An Arco representative testified that the location of an air pump at the gasoline island would create more traffic that could bump into people pumping gasoline. After the accident, Santilli told an Arco representative that he wanted the air pump moved because he felt the location of the air pump "may have contributed to the incident." According to Santilli, he moved the air pump from the island to the side of the station building after he experienced problems with the air line freezing during the winter of 1978.

At self-service stations owned by Arco, the company had a policy of equipping the stations with pump operation precaution signs. One of the precautions Arco recommended for the safe dispensing of gasoline was that the person dispensing gasoline is "to be aware of other vehicles in the area." Santilli testified that the risk of being hit by a car while pumping gasoline was

not obvious to him before he learned "the gas station business." An Arco representative testified that Arco did not require the pump precaution sign to be placed at mini-serve stations because members of the public were not supposed to pump gasoline at mini-serve pumps.

3. *Analysis*. In reviewing whether the evidence was sufficient to establish negligence on the part of Arco, we adopt the view of the evidence most favorable to the plaintiffs. *Poirier* v. *Plymouth*, 374 Mass. 206, 212 (1978). The test is whether "anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff." *Id.*, quoting *Raunela* v. *Hertz Corp.*, 361 Mass. 341, 343 (1972). Only when no rational view of the evidence warrants a finding that the defendant was negligent may the issue be taken from the jury. *Mullins* v. *Pine Manor College*, 389 Mass. 47, 56 (1983). In applying this test, we are unable to discern any view of the evidence which would support the verdicts in favor of the plaintiffs. Although we have said that judicial intrusion into jury decision-making in negligence cases is exceedingly rare, *MacDonald* v. *Ortho Pharmaceutical Corp.*, 394 Mass. 131, 140, cert. denied, 106 S. Ct. 250 (1985), these verdicts cannot stand.

Arco had a duty to maintain its "property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk." *Mounsey* v. *Ellard*, 363 Mass. 693, 708 (1973). This duty includes the duty to act with reasonable care to prevent harm caused by a third person. *Mullins*, *supra* at 54. Indeed, in its brief Arco admits that it owed the plaintiffs a duty to keep the station in reasonably safe condition or to warn them against dangers that might arise from the use of the property that they were not likely to recognize.

The determinative question in this case is whether Arco's duty to use reasonable care to keep the station reasonably safe required Arco to post warning signs in the station. The plaintiffs argue that Arco was negligent in failing to post a sign at the

mini-serve pump which would have informed patrons that the attendant pumped the gasoline. Alternatively, they argue that Arco was negligent because it did not post a sign warning its patrons to be aware of other automobiles in the area. Even if we assume that Arco's failure to post "an attendant will pump gas" sign negligently increased the likelihood that customers would leave their vehicles to pump gas, the risk that a customer who left his vehicle to pump gas would be injured by a negligently operated motor vehicle was not a reasonably foreseeable consequence of any negligent failure to post such a sign. As our cases often say, Arco's negligence, if any, was not the proximate cause of the injury. Cast differently, Arco's breach of duty did not create a risk of the species which was causally related to the result which occurred. *Bellows* v. *Worcester Storage Co.*, 297 Mass. 188, 197 (1937). See *Stone* v. *Williams*, 64 N.Y. 2d 639, 642 (1984) (plaintiff injured in rear end collision while checking whether attendant had securely replaced gas cap; held that breach of duty of service station, if any, was not proximate cause of plaintiff's injuries). W.L. Prosser & W.P. Keeton, Torts 426-427 (5th ed. 1984).

The plaintiffs also argue that Arco had a duty to post a sign warning its patrons to be aware of other automobiles in the area. We disagree. If a risk is of such a nature that it would be obvious to persons of average intelligence, there is, ordinarily, no duty on the part of the property owner to warn of the risk. *St. Rock* v. *Gagnon*, 342 Mass. 722, 724 (1961). *Clough* v. *New England Tel. & Tel. Co.*, 342 Mass. 31, 35-36 (1961). *Del Sesto* v. *Condakes*, 341 Mass. 146, 147 (1960). In our society, the average fifteen-year-old boy who has completed the tenth grade has been taught from a very young age about the dangers of automobiles. Such dangers are obvious to a fifteen-year-old of average intelligence. See *Polak* v. *Whitney*, 21 Mass. App. Ct. 349, 353 (1985) (no duty to warn that an automobile could collide with an automobile parked on the street near defendant's house). Arco had no duty to warn of a danger of which the plaintiffs should have been aware. *St. Rock, supra* at 724; Prosser & Keeton, *supra* § 61, at 427.

We also disagree with the plaintiffs' contention that Arco was negligent in placing the air pump at the gasoline islands. To be sure, Arco had a duty to design the station in a safe manner where vehicles had sufficient room to maneuver and patrons were not unreasonably placed at risk, but the location of the air pump at the gasoline island gives no indication that Arco violated this duty. The air pump created no greater danger than would the presence of another gas pump. Although the air pump increased traffic at the island, just as an additional gas pump would have done, the increased possibility of injury which could result from increased traffic is a risk which is obvious and not unreasonable. Arco is only required to use reasonable care to make its stations reasonably safe. *Mounsey* v. *Ellard*, 363 Mass. 693, 708 (1973).[5]

The plaintiffs also claim that Arco's appeal should not be heard because Arco's counsel told the jury Arco would "stand by your verdict" during closing argument. The plaintiffs' reliance on *Dalton* v. *Post Publishing Co.*, 328 Mass. 595, 599 (1952), is inapposite. Defense counsel's expression of confidence in the jury system in no way amounted to a waiver of rights, as was the case in *Dalton*. We have never held such a statement to amount to a waiver of appellate rights, and we decline to do so today.

Judgments reversed.

[5] In their brief the plaintiffs cite several products liability cases in arguing that Arco had a duty to warn of the dangers involved in the use of gasoline. In the cases cited by the plaintiffs, the duty imposed was a duty to warn about the dangers of a *product*. In the present case, there was no evidence that the product gasoline was in some way defective or dangerous. In fact, at a later point in their brief, the plaintiffs admit that the sole theory of liability was that the *premises* were unsafe. Since we agree with the plaintiffs that Arco had a duty to use reasonable care to maintain a safe service station under *Mounsey*, *supra*, we conclude that the cases defining the duty to warn about dangerous products are not controlling.

WILKINS, J. (concurring). One may fairly conclude that some customers would reasonably have interpreted a mini-serve sign as the equivalent of a self-service sign. The sign thus increased the likelihood that certain customers would leave their vehicles to pump gas. The question is whether, as a matter of law, Arco's failure to erect a sign warning customers to be on guard against other vehicles did not unreasonably increase the risk of injury caused by the improper operation of other vehicles on the premises. I agree with the court that the evidence did not present a jury question.

Conclusions such as no "probable cause" or the absence of "reasonable foreseeability" help to describe the result, but they do little or nothing to explain the considerations that led to those conclusions. In my view, the risk of injury to a customer from the negligent operation of another vehicle on the premises of a self-service station is inherent and obvious. There is no duty to warn of such a danger.

ABRAMS, J. (dissenting). I dissent from the result reached by the court. The court assumes that Arco was negligent in failing to post the sign "an attendant will pump gas," but then concludes that any negligence on the part of Arco was not the proximate cause of Lloyd Young's accident.[1] I do not believe the court needs to assume negligence because it is clear, on the

[1] I agree with the court's statements of our standard of review. In reviewing the denial of the motion of judgment notwithstanding the verdict, we must consider whether "anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff." *Raunela* v. *Hertz Corp.*, 361 Mass. 341, 343 (1972). See *Poirier* v. *Plymouth*, 374 Mass. 206, 212 (1978). Moreover, whether a particular warning, or whether the omission of a particular warning, satisfies the duty to convey the nature and extent of the danger "is almost always an issue to be resolved by a jury; few questions are 'more appropriately left to a common sense lay judgment than that of whether a written warning gets its message across to an average person.' *Ferebee* v. *Chevron Chem. Co.*, 552 F. Supp. 1293, 1304 (D.D.C. 1982)." *MacDonald* v. *Ortho Pharmaceutical Corp.*, 394 Mass. 131, 140, cert. denied, 106 S. Ct. 250 (1985). It does not appear, however, that the court applied these principles.

basis of our cases defining the duty of a landowner to maintain premises in a reason ably safe condition and the duty of a seller of a product to warn of dangers inherent in the use of its product, that Arco violated its duty to warn the plaintiffs' son concerning the manner in which mini-serve gasoline was to be distributed.[2] See *Back* v. *Wickes Corp.*, 375 Mass. 633, 640-641 (1978); *Schaeffer* v. *General Motors Corp.*, 372 Mass. 171, 173-174 (1977); *Mounsey* v. *Ellard*, 363 Mass. 693, 708-709 (1978). But, more importantly, I believe that the risk that a customer who left his automobile to pump gas would be injured by a third party was reasonably foreseeable from Arco's negligent failure to warn or instruct its customers as to the meaning of mini-serve.

The Restatement (Second) of Torts § 442D, at 469 (1965), states that, "[w]here the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability . . . ." The court has said that a first wrongdoer will not be excused from liability by the act of a third party which intervenes and contributes to the injury, if the act should have been foreseen.[3] *Jesionek* v. *Massachusetts*

[2] I do not agree with the court's conclusion that the cases defining the duty to warn about dangerous products are not controlling on the facts of this case. See *ante* at 843 n.5. The court defines the duty imposed in duty to warn cases very narrowly, by stating that a manufacturer need only warn of the dangers of a *product*. *Id*. We have stated that a manufacturer also must warn about *use* of a product in a particular setting. See *Back* v. *Wicks Corp.*, 375 Mass. 633, 640-641 (1978); *Schaeffer* v. *General Motors Corp.*, 372 Mass. 171, 173-174 (1977). I believe our law concerning the duty to warn is instructive in this case because, if a product is dispensed on a particular premises, part of the analysis as to whether the premises are reasonably safe is whether the distribution of the product is occurring in a manner which does not jeopardize the safety of the area. If there are dangers inherent in the use or distribution of a particular product, in order to maintain reasonably safe premises, a manufacturer or seller must either design around these dangers or warn and instruct users to beware of the possible dangers.

[3] The Restatement (Second) of Torts § 302A comment c, states that "the actor is required to know that there is a certain amount of negligence in the world, and that some human beings will fail on occasion to behave as a reasonable [human being] would behave."

Port Auth., 376 Mass. 101, 105 (1978). See *Mullins* v. *Pine Manor College*, 389 Mass. 47, 62 (1983). The scope of Arco's duty and the act which should have been foreseen does not include a duty to foresee this particular accident, but it does include a duty to act reasonably to protect customers against the possibility of being struck by a motor vehicle. In the circumstances of this case, it was reasonably foreseeable that an accident would happen at a mini-serve pump because customers did not understand that they should not get out of their vehicles — either to pump gas or to seek out a gas station attendant to find out what mini serve meant. Evidence was presented that customers did not understand what mini-serve meant because these stations were extremely uncommon at the time of this accident. Santilli testified that many customers pumped their own gas at the mini-serve pump because they thought mini-serve meant self-serve. Moreover, Santilli stated that, until he entered the gas station business, he did not appreciate the hazards associated with other vehicles at a gas station. The plaintiffs' son, by pumping his own gas, was exposed to the foreseeable risk of harm that he would be injured by another vehicle at the gasoline station. In order to reach its result the court assumes that the sign "an attendent will pump gas" would not have been read or heeded. On the contrary, Arco's failure to give any warning or instructions "permits the inference that it would have alerted the user to the danger and forestalled the accident." *Wolfe* v. *Ford Motor Co.*, 6 Mass. App. Ct. 346, 349 (1978). Thus, the conduct of Arco, in failing to supply a sign, was a subtantial factor in bringing about the harm which occurred here.

While there is always some risk of harm at a gas station, be it from the presence of a highly flammable substance or from the presence of many vehicles in a small area, the failure to warn or instruct customers concerning the mini-serve program increased this risk of the harm which incurred here. Customers were outside of their vehicles and exposed to these dangers in a situation where they could have remained in their vehicles and waited for an attendant, had they realized that the attendant pumped the gas. The law does not require that

the "precise manner in which the harm occurs . . . be foreseen." *Solimene* v. *B. Grauel & Co., K.G.*, 399 Mass. 790, 798 (1987). See *Michnik-Zilberman* v. *Gordon's Liquor, Inc.*, 390 Mass. 6, 12 (1983); *Luz* v. *Stop & Shop, Inc. of Peabody*, 348 Mass. 198, 204 (1964). Moreover, the particular manner in which the harm occurs is not material if the general danger to which the plaintiff was exposed should have been foreseen by the defendant. *Lawrence* v. *Ramco*, 8 Mass. App. Ct. 854, 858 (1979). Because questions of causation, proximate and intervening, present issues for the jury to decide, see, e.g., *Michnik-Zilberman, supra* at 12; Mullins, *supra* at 58, I believe the court errs by deciding, as a matter of law, that any negligence of Arco was not the proximate cause of the plaintiffs' injuries. On the basis of our cases, the issue of proximate cause presented an issue for the jury to decide. See, e.g., *Solimene* v. *B. Grauel & Co., K.G.*, 399 Mass. 790 (1987); *Michnik-Zilberman, supra; Mullins* v. *Pine Manor College*, 389 Mass. 47 (1983); *Jesionek* v. *Massachusetts Port Auth.*, 376 Mass. 101 (1978); *Luz* v. *Stop & Shop, Inc. of Peabody, supra; Wallace* v. *Ludwig*, 292 Mass. 251 (1935); *Lane* v. *Atlantic Works*, 111 Mass. 136 (1872).

The court also concludes that Arco had no duty to warn its customers to be alert for other automobiles in the area because the danger posed by automobiles should have been obvious to the plaintiffs' son. I disagree. Again, we must view the evidence on this issue in the light most favorable to the plaintiffs. *Poirier* v. *Plymouth*, 374 Mass. 206, 212 (1978). As already noted, Santilli stated that, prior to entering the gas station business, he did not appreciate the dangers posed by other vehicles at the gas station. Moreover, in training employees in the safe dispensing of gas, Arco instructed them to be alert for vehicles in the area. Finally, a warning of this sort was included on the self-service pumps. Arco did not consider the danger presented by other vehicles to be so obvious that it was unnecessary to warn both employees and the public. Cf. *Kalivas* v. *A.J. Felz Co.*, 15 Mass. App. Ct. 482, 487 (1983) (jury could find that a warning given to the public which was not as extensive as that given to salesmen rendered product defec-

tive). Given that Arco itself realized that individuals dispensing gas may not appreciate the dangers posed by other automobiles, it is also error for the court to take this issue from the jury and decide, as a matter of law, that the dangers associated with other automobiles in the gas station are obvious.

An obvious or a known danger requires not only knowledge of the activity or the condition, but also appreciation of the danger, including the probability and the gravity of the threatened harm.[4] See Restatement (Second) of Torts § 343A comment b. It is important to look to the exposure an individual has had with the particular circumstances to determine whether the individual is "fully conscious of the dangers that are present." *Mullins* v. *Pine Manor College*, 389 Mass. 47, 52 (1983). Clearly, the victim's exposure to the dangers presented was minimal. He had never pumped gas before. He was not old enough to drive. In fact, he was having difficulty replacing the gas cap at the time the accident occurred. Whether the victim could appreciate the dangers creates an issue for the jury, not the court.

In addition, as comment f of the Restatement (Second) of Torts § 343A notes, there are situations in which a possessor of land should anticipate that a dangerous condition will cause harm to another regardless of the obviousness of the danger. "Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it." Restatement (Second) of Torts § 343A comment f, at 220. In this case, even if the danger posed by other vehicles in the gas station was obvious, the plaintiffs' son was distracted by the difficulty he was encountering replacing the gas cap and was not aware of the need to protect himself from the danger.

[4] The court has rejected the rule that, where a product is obviously dangerous, a manufacturer cannot be found liable. *Uloth* v. *City Tank Corp.*, 376 Mass. 874, 881 (1978). "The law, we think, ought to discourage misdesign rather than encouraging it in its obvious form." *Id.*, quoting *Palmer* v. *Massey Ferguson, Inc.*, 3 Wash. App. 508, 517 (1970).

Santilli's testimony reflects that he was aware that the plaintiffs' son did not appreciate the danger posed by others in the gas station. While a general understanding that motor vehicles are dangerous might be obvious as a matter of law, the danger presented by pumping gasoline and thereby becoming involved in an automobile accident is not so obvious that it does not even present an issue for the jury. The jury could properly have based their finding of negligence on this ground alone.[5] I dissent.

[5] According to the principles expressed in *Mounsey* v. *Ellard*, 363 Mass. 693, 708 (1978), Arco had the duty to maintain its property in a reasonably safe condition, in view of all the circumstances. This test of "reasonableness in all the circumstances" permits the jury to determine what burdens of care are unreasonable in light of the expense and difficulty imposed on an owner balanced against the probability and seriousness of the foreseeable harm to others. *Id.* at 709. Because the evidence concerning the omissions of warnings was sufficient to permit the jury to conclude that Arco had violated its duty to maintain its property in a reasonably safe condition, I do not believe it is necessary to reach the other evidence of Arco's negligence, including the evidence involving the design of the gas station.

Appendix B.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT Boston, September 2, 1987.

IN THE CASE NO. SJC-4254

MARSHALL YOUNG, administrator, & another vs. ATLANTIC RICHFIELD COMPANY pending in the Superior Court Department of the Trial Court for the County of Norfolk No. 124440

ORDERED, that the following entry be made in the docket; viz., —

Judgments reversed.

BY THE COURT,

Jean M. Kennett, Clerk.

September 2, 1987
See opinion on file.

Appendix C.

Law Offices of
LEONARD GLAZER, P.C. & ASSOCIATES
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September 16, 1987

The Honorable Edward F. Hennessey,
Chief Justice,
Supreme Judicial Court for the Commonwealth,
New Court House,
Pemberton Square,
Boston, MA 02108.

Re: **PETITION FOR REHEARING**
Young v. *Atlantic Richfield Co.*, 400 Mass. 837 (1987)
Docket No. SJC-4254.

Dear Mr. Chief Justice:

Pursuant to Mass. R. App. P. 27, the Plaintiffs-Appellees (plaintiffs) hereby submit this petition for a rehearing of the above matter with regard to the rescript dated September 2, 1987.

In its decision, the Court has seriously misapprehended the true nature of the danger involved in this case: rather than the dangers of moving vehicles in gas stations, it was the dangers of a customer being struck by another vehicle while *distracted* and preoccupied during the unfamiliar process of dispensing gas that was the gravamen of this case. It was this danger to per-

sons unfamiliar with dispensing gasoline that Arco foresaw and knew would not be obvious to people who are distracted that led Arco to require a pump precaution warning sign ("be aware of other vehicles in the area" while dispensing gas) to be posted in self-serve stations, and led Arco to instruct its own employees to remain attentive to other vehicles while pumping gas.

In misapprehending the true nature of the danger by disregarding the evidence, the Court has violated the standard of review, has substituted its own view of the evidence, and has gone beyond the evidence and the proper June 22, 1977 time frame. The net effect will represent bad precedent and an unconstitutional intrusion on the jury function.

This petition for rehearing affords the court a last opportunity to reconsider the issues and the implications of its decision. It is in this light that the following analysis of the Court's decision is respectfully submitted.

1. *The Misapprehension as to the True Nature of the Danger*. The Court has unfortunately misapprehended the true nature of the dangers involved in this case and therefore concluded that Arco had no duty to warn. 400 Mass. at 837. The Court characterizes the dangers as those of being hit by moving vehicles — dangers which would be obvious to "a fifteen-year-old of average intelligence." *Id.* In this view, the Court has seriously misapprehended what the real dangers were — the risk that one unfamiliar with the mechanics of dispensing gasoline would be distracted and would be placed in a vulnerable position so that he would become unaware of what otherwise might have been obvious, namely vehicles moving within the station.[1]

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[1] The plaintiffs, in their brief, made clear the true nature of the dangers in this case: "It was this danger resulting from distraction while replacing the gas cap which he was having difficulty with (R. 210-211), unfamiliarity with pumping gas, and inexperience with gas stations so that Lloyd Young would not

The Court misses the point when it states that the dangers of automobiles "are obvious to a fifteen-year-old of average intelligence," 400 Mass. at 842, who should have appreciated the dangers posed by moving vehicles.[2] One is hard pressed to see how any view of the evidence could lead to any inference *other* than that, from Arco's pre-accident perspective, the accident was foreseeable and the risk was not obvious to people not familiar with the mechanics of dispensing gas and who would be distracted while doing unless provided with appropriate warnings or instructions.[3] Most telling in this regard, and also overlooked in the decision, was Arco's own training of its

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be aware of the danger of vehicles moving near him and the need to be looking around for them (R. 219) which posed the danger to which he was exposed, not the mere presence of vehicles in a gas station alone that Arco suggests in its brief. Distractions, unfamiliarity and inexperience obviate obviousness. This must be contrasted with Arco's assertion at 15 in its brief that the danger Lloyd Young faced was the same as "on a public street;" a person in a public street has been trained since childhood to be aware and look around and is not distracted by unfamiliar activities. Moreover, for Arco to suggest at 15 that Lloyd Young was merely "standing in a station" distorts the situation of where he was and why he was there." Brief of Plaintiffs-Appellees Pursuant to Order of the Supreme Judicial Court Dated December 11, 1986 (hereafter, Plaintiffs' Brief) at 27 n.50. See Tribe v. Shell Oil Co., Inc., 652 P.2d 1040, 1042 (Ariz. 1982) (cited by the plaintiffs in their brief at 28) which refers to §343A, comment f, of the Restatement (Second) of Torts (1965) that recognizes the dangers of distractions.

[2]The plaintiffs have never contended that Lloyd Young was entitled to any special treatment or warning because of his age, but rather that any person unfamiliar with the process of gasoline dispensing needed a warning to remain alert and attentive to other vehicles while engaged in the distracting process of pumping gas.

[3]The opinion omitted any reference to the evidence that Arco's recommended procedure for the safe dispensing of gasoline, "to be aware of other vehicles in the area," was something Arco "recommend[ed] to *people who were unfamiliar with the proper procedures* for dispensing gasoline." Plaintiffs' Brief at 14 (emphasis is original). This is clear evidence of Arco's knowledge that people unfamiliar with gasoline dispensing were unlikely to be aware of the risk of moving vehicles while distracted when engaged in pumping gas.

own employees and dealers[4] during which it instructed them as to Arco's recommended procedures for the safe dispensing of gasoline which included "be[ing] aware of other vehicles in the area." Plaintiffs' Brief at 14-15. It is difficult to postulate a rational basis for such instructions by Arco to its own employees and dealers if Arco felt the dangers of being struck by a vehicle while distracted when dispensing gasoline were so obvious without adequate instruction.[5] Moreover, the fact that Arco provided such instructions to its own employees and dealers, and to the public at self-serve stations, permitted the jury to find that Lloyd Young was similarly entitled to that information.

In addition to the evidence of Arco's instructions to its own employees and dealers, there was direct evidence that the danger of distraction while one is engaged in dispensing gas was not an obvious one, and the risk of injury therefrom was not unforeseeable: Santilli testified that it had not been obvious to him that there existed a risk of being struck by other vehicles while dispensing gas until he had learned the gas station business.

2. *Rational View of the Evidence.* The Court has set forth the applicable standard of review, namely, "whether 'anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff[s].'. . . Only when no rational view of the evidence warrants a finding that the defendant was negligent may the issue be taken from the

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[4] Arco also asked its employees and dealers to instruct their own people "to be aware of other vehicles in the area" while dispensing gas. Plaintiffs' Brief at 26-27. This evidence was also overlooked by the Court.

[5] As noted by Justice Abrams, "Arco did not consider the danger presented by other vehicles to be so obvious that it was unnecessary to warn both employees and the public." 400 Mass. at 847.

jury." 400 Mass. at 841. Yet despite this, the Court, in its opinion, has disregarded this standard.

The conclusion that there is "no rational view of the evidence . . . which would support the verdicts" is nothing less than a determination that the views of other judges (including one of the justices of this Court) who have reviewed the evidence in this case based their conclusions upon irrational views of the evidence. In this regard, it is important to note that Justice Abrams's dissent was founded essentially upon a "view" and analysis of the *evidence*. The mere existence of a dissenting view by one justice based upon such justice's view of the evidence is a *per se* manifestation that the majority's conclusion that "no rational view" would support the verdicts is incorrect; the dissent is irreconcilable with such a conclusion.[6]

The Court's conclusion that "*no* rational view of the evidence . . . would support the verdicts in favor of the plaintiffs," 400 Mass. at 841 (emphasis added), is untenable and has overlooked the following:

1. Prior to the trial, a Superior Court judge denied Arco's motion for summary judgment, thereby manifesting a belief that the plaintiffs' evidence provided a rational basis for proceeding to trial;
2. At the trial, after five days of deliberations, twelve jurors found that the evidence presented to them when viewed in accordance with the trial judge's instructions provided a rational basis for finding that the dangers were not obvious, that the risks were foreseeable, and that Arco was negligent;

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[6]The net effect is that the Court is substituting its own view of the evidence for that of the jury, but to do so, the Court has effectively had to brand all contrary views, including those of one of its own Associate Justices, as irrational.

3. After the trial, the trial judge, in denying Arco's motion for judgment notwithstanding the verdict, found that there were rational grounds based upon sufficient evidence to support the jury's verdict; and
4. As indicated in this Court's own decision, a justice of this Court, in dissent, found that there indeed exists a rational view of the evidence which would support the jury's verdict.

The Court's conclusion that there is "no rational evidence . . . to support the jury's verdicts" needs to be reconsidered. As it now stands, the decision amounts to an arbitrary intrusion on, and usurpation of, the jury function, and constitutes a denial of the plaintiffs' constitutional rights to a trial by jury as well as a deprivation of their rights to due process of law under the fifth, sixth and fourteenth amendments to the United States Constitution and articles ten, eleven and fifteen of the Constitution of the Commonwealth of Massachusetts.

3. *The Concurring Opinion*. The concurring opinion similarly does not address the true nature of the dangers involved, namely, the risk of being struck by a vehicle while distracted when pumping gas. It also overlooks the crucial fact that the accident occurred in 1977 when self-serve (and mini-serve), as admitted by Arco, were only just emerging in Massachusetts. Plaintiffs' Brief at 9. What might be obvious now, ten years later and with a decade's worth of experience with self-serve, was not at all obvious when the concept was just begin [*sic*] to appear.

Despite the fact that this was *not* a case involving the self-serve method of dispensing gas, it did not involve self-serve in any way (except by virtue of the confusion with self-serve that mini-serve engendered, and by virtue of the instructions Arco would have deployed if it had been a self-serve station), the concurring opinion goes beyond the evidence in discussing

the dangers of self-serve. The net effect is that, in a case not involving self-serve, in a case in which the safety of self-serve was neither on trial nor an issue, in a case in which there was no evidence presented or considered as to the safety and/or obviousness (or lack thereof) of dangers in self-serve stations, the concurring opinion effectively takes judicial notice that operators of self-serve stations have no duty to their customers with respect to the negligent operation of other vehicles. Thus, in the face of direct evidence by Santilli that the risk of being hit by another vehicle while distracted when pumping gas was not obvious, and the evidence that Arco foresaw problems by requiring the posting of pump precaution signs concerning risks of other vehicles at its self-serve stations, the Court has judicially ignored the actual case that was before the jury, and premised arguments upon facts not in evidence. The highest court of this state should be held to the same constraints as a jury, and should not go beyond the evidence. Unless corrected, the Court's action in doing so could set an unfortunate precedent.

In conclusion, it is urged that based on the foregoing arguments and authorities that the petition for rehearing be granted.

Respectfully submitted,

Plaintiffs-Appellees,
By their attorneys,

Leonard Glazer

CERTIFICATE OF SERVICE

I, Leonard Glazer, attorney for the plaintiffs, herein, hereby certify that I have this day served a copy of the within Petition for Rehearing, first class mail, postage pre-paid to: Thomas D. Burns, Esq., Burns & Levinson, 50 Milk Street, Boston, MA 02109.

Leonard Glazer

Dated: September 16, 1987

Appendix D.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH
ROOM 1412 COURT HOUSE
BOSTON, MASSACHUSETTS 02108
(617) 725-8055

JEAN M. KENNETT
Clerk

FREDERICK J. QUINLAN
Assistant Clerk

October 1, 1987

Leonard Glazer, Esq.
1 Longfellow Plaze, Suite 3408
Boston, MA 02114

Dear Mr. Glazer: RE: **MARSHALL YOUNG,** administrator, & another vs. **ATLANTIC RICHFIELD COMPANY**
Supreme Judicial Court No. SJC-4254

Your Petition for Rehearing in the above captioned appeal has been considered by the court and is denied.

Very truly yours,

Dolores G. Dupré
for Jean M. Kennett, Clerk

c.c.: **Thomas D. Burns, Esq.**
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